Supreme Court, U.S.
FILED
MAR 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE OGLALA SIOUX TRIBE and
THE ROSEBUD SIOUX TRIBE,
Petitioners,

v.

THE UNITED STATES and
THE SIOUX TRIBE OF INDIANS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

MEMORANDUM IN OPPOSITION OF RESPONDENT SIOUX TRIBE OF INDIANS

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QUESTION PRESENTED

The only issue before the court below was whether the Claims Court, after its decision on the merits had become final, abused its discretion in a Rule 60(b) proceeding when it held that counsel for the parties did not effect an unauthorized settlement of this Indian claims case by entering into a stipulation of facts as to the amount of various offsets against a prior interlocutory award. The Federal Circuit found no abuse of the trial court's discretion and thus allowed its final judgment to stand.

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MEMORANDUM IN OPPOSITION OF RESPONDENT SIOUX TRIBE OF INDIANS

STATEMENT OF THE CASE

This litigation commenced in 1950 with the filing of a petition under the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. 70 *et seq.*, in the name of the land-owning, treaty-signing Sioux Tribe of Indians ("Sioux Tribe") (Pet. App. 17a-18a). The Sioux Tribe, the owner of the 1868 Treaty claim,[1] has not existed as an

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[1] Under the Treaty of April 29, 1868, 15 Stat. 635, the United States acquired from the Sioux Tribe a substantial area of land for what the Commission ultimately determined was an inadequate consideration. 25 U.S.C. 70a; *Sioux Tribe* v. *United States*, 42 Ind. Cl. Comm. 214, 257 (1978).

entity since 1890, when the United States divided the single Great Sioux Reservation into separate reservations. *See* Act of March 2, 1889, 25 Stat. 888. As permitted by the Claims Act, suit was brought in a representative capacity on behalf of the Sioux Tribe by eight present-day Sioux reservation tribes (Pet. App. 2a, 12a). The suit could have been instituted and maintained by any one of these tribal representatives or, under certain circumstances, even by individual Sioux. 25 U.S.C. 70i; *Yavapai, et al.* v. *United States*, 15 Ind. Cl. Comm. 68, 96 (1965).

The course of the case subsequent to its initial filing, a 37-year history of trials, decisions and appeals,[2] is summarized in the majority opinion of the court below (Pet. App. 2a-4a; *see also*, Pet. App. 18a-26a). By 1980, all questions as to jurisdiction, liability and value had been determined, and the amount of the offsets which the defendant properly could assert against an interlocutory award of $43,949,700 became the only unresolved issue remaining in the case. Pet. App. 8a, 32a; *United States* v. *Sioux Tribe*, 616 F.2d 485, 494 (Ct. Cl. 1980).

On July 30, 1987, the Claims Court, as successor to the Indian Claims Commission, entered a final judgment for $40,245,807.02 in favor of the plaintiff Sioux Tribe

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[2] *See, e.g.: Sioux Tribe* v. *United States*, 500 F.2d 458 (Ct. Cl. 1974); *United States* v. *Sioux Tribe*, 616 F.2d 485 (Ct. Cl. 1980), *cert. denied sub nom., Yankton Sioux Tribe* v. *United States*, 446 U.S. 953 (1980); *Cheyenne River Sioux Tribe* v. *United States*, 806 F.2d 1046 (Fed. Cir. 1986), *cert. denied sub nom., Oglala Sioux Tribe* v. *United States*, —— U.S. ——, 107 S. Ct. 3184 (1987). Before present counsel for the Sioux Tribe entered this case in 1957, the 1868 Treaty claim had been dismissed in its entirety (2 Ind. Cl. Comm. 646 (1954)), and that dismissal had been affirmed on appeal. *Sioux Tribe of Indians* v. *United States*, 146 F. Supp. 229 (Ct. Cl. 1956), judgment vacated by order dated November 5, 1958 (unreported); *see* 182 Ct. Cl. 912 (1968).

(Pet. App. 44a). This judgment was based upon specific rulings by the Claims Court covering the various categories of Government expenditures that constituted allowable offsets as a matter of law and a fact stipulation, upon which counsel for the parties had agreed, covering the Government's actual expenditures in each allowable offset category (Pet. App. 46a-48a).[3] Judgment followed because, after the court's rulings on the law and approval of the fact stipulation, nothing remained in the case to be done (Pet. App. 9a-10a).

On September 28, 1987, two of the eight present-day tribal representatives, the Oglala and Rosebud Sioux Tribes ("petitioners"), filed a motion for relief from judgment under Claims Court Rule 60(b), which alleged that the Sioux Tribe and the United States had entered into an unauthorized settlement. This action, taken two months after the entry of final judgment, constituted the very first separate appearance in the trial court by either petitioner. As the Claims Court expressly found: "From the beginning of this case 37 years ago until the entry of judgment, the eight Sioux tribal representatives, including the movants [petitioners], acted together through the attorney of record and his predecessor counsel, in the prosecution of the 1868 Treaty claim * * *. At no time during any proceedings at the trial court level did either movant party seek separate legal representation, or raise any new and different legal or factual issues, or in any

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[3] The court below, in the hope that this case might thereby progress more speedily, earlier had suggested that

> the parties may be able to stipulate the total dollar amount of various categories of offsets to which the government is entitled. If the parties can so stipulate, this may be action that counsel for the Sioux Tribe can take as part of the normal conduct of litigation without the necessity of obtaining the approval of their clients.

Cheyenne River Sioux Tribe v. *United States*, *supra*, 806 F.2d at 1053.

other way take an independent legal position." Pet. App. 37a.

The Claims Court denied petitioners' Rule 60(b) motion by Memorandum Order issued on December 17, 1987 (Pet. App. 17a-40a). On appeal, the Federal Circuit affirmed, holding that the Claims Court did not abuse its discretion in determining (1) that counsel's agreement as to the dollar amounts of allowable offsets was a fact stipulation executed in the normal course of litigation, not a settlement, and (2) that Sioux counsel had full authority to enter into the fact stipulation (Pet. App. 1a-16a, Opinion of November 23, 1988). The court below further pointed out that, because the case had been brought in a representative capacity, "the elimination of the two appellant tribes as plaintiffs in the suit would not change the judgment in favor of the Sioux Tribe of Indians" (Pet. App. 12a).[4] Finally, on December 28, 1988, the Federal Circuit declined petitioners' suggestion for a rehearing *en banc* (Pet. App. 51a).

REASONS FOR DENYING THE WRIT

I. The decision below does not involve a significant question of federal law or any "discriminatory new rule."

Petitioners' Rule 60(b) motion consisted primarily of an argument that the fact stipulation with respect to offsets entered into by counsel for the Sioux Tribe and the United States really was a settlement which required tribal consent. For the reasons given at length in its Memorandum Order (Pet. App. 31a-36a), and summarized with approval in Judge Friedman's opinion for the court below (Pet. App. 8a-10a), the Claims Court concluded that the fact stipulation was executed "as part of the normal conduct of litigation" and could "in no way be considered to be a settlement agreement. . . ."

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[4] In like vein, the Claims Court had observed that petitioners are not aggrieved by the judgment (Pet. App. 39a-40a).

(Pet. App. 31a, 36a).[5] This holding not only was correct, but, of course, also reflected the particular circumstances of this case. That portion of the decision below which affirmed the Claims Court's holding, therefore, plainly raises no question of sufficient importance to warrant exercise of this Court's certiorari jurisdiction.

The Federal Circuit's determination that Sioux counsel was authorized to execute the fact stipulation is equally case-specific and devoid of general significance. Faced with this juridical hurdle, petitioners here argue that the lower courts have allowed an attorney "to usurp the right of Indian tribes to control their legal claims" (Pet. 11)—conduct that would not be permitted counsel for any other class of litigants. As is shown below, the facts belie this claim of discriminatory treatment.

First, the record as to which Sioux tribe assumed what legal position in this case needs clarification. Briefly stated, all eight representative Sioux tribes employed counsel in 1957 to prosecute the 1868 Treaty claim under contracts approved by the Secretary of the Interior (Pet. App. 11a).[6] Although some of the tribes allowed their contracts to lapse after 20-30 years, at no time prior to final judgment did any of these tribes, including petitioners, move for leave to substitute counsel, as permitted under Claims Court Rule 81(d), or in any other way seek in court to change the conduct of the litigation (Pet. App. 11a; Pet. App. 28a, 37a). Moreover, to this day,

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[5] After a detailed analysis of its three offset opinions and the matters upon which counsel actually had agreed, the Claims Court determined that "the Stipulation of Facts did no more than eliminate the need for trial on a finite, easily resolvable factual question —the dollar amount of described Government expenditures. . . ." Pet. App. 35a.

[6] Ironically, counsel was hired to resuscitate the then moribund 1868 Treaty claim (*see* p. 2, n.2, *supra*). Now, after 30 years of litigating this matter "with uncommon skill and devotion to [his] clients" (Pet. App. 40a), he is faulted by petitioners for winning it.

six of the eight reservation tribes have not joined with petitioners, which certainly indicates that "they are satisfied with the amount and adequacy of the money judgment" (Pet. App. 39a).

The only tribe which may be said actively to have expressed a concern pre-judgment about the continued prosecution of this case is petitioner Oglala Sioux Tribe ("Oglala").[7] Oglala's various council resolutions calling for dismissal of the 1868 Treaty claim,[8] however, were literally impossible to implement given the contrary litigating posture of the other Sioux tribes. Moreover, rather than follow standard judicial procedures available to all litigants seeking relief, Oglala wholly failed to communicate its views to the court "in an appropriate or timely manner" (Pet. App. 36a). Indeed, in contrast to its claim of discrimination, Oglala's record of deliberate silence before the trial court is consistent and indisputable:

1. In 1980, for example, Sioux counsel moved for leave to withdraw as attorney for the Oglala (Pet. App. 10a; Pet. App. 37a). The tribe ignored that motion. The Court of Claims (Trial Division) denied the motion without prejudice, but stated that the "motion may be renewed, however, at such time that the Oglala Sioux Tribe

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[7] Although not a single act to such effect is mentioned, petitioners contend nonetheless that the Rosebud Sioux Tribe "took many steps to extricate [itself] from these proceedings" (Pet. 6). This statement is not accurate. As the Claims Court pointed out: "Until the entry of judgment, the Rosebud Sioux Tribe also had never expressed the slightest dissatisfaction with the conduct of this litigation by counsel—in this Court or in the appellate courts" (Pet. App. 38a, n.5).

[8] In Resolution No. 83-160, printed in the Joint Appendix before the Federal Circuit at 122, for example, Oglala expressed its "official position that Docket 74 [the 1868 Treaty claim] be withdrawn from the Court of Claims. . . ." That resolution is mischaracterized by petitioners (Pet. 9-10) and in the dissent below (Pet. App. 15a) as calling only for dismissal of Oglala from the case.

seeks by appropriate motion to make a proper substitution of counsel" (Pet. App. 10a). The tribe ignored that order and a subsequent letter to the same effect from the trial judge (Pet. App. 37a-38a; Pet. App. 42a-43a).

2. In 1983, Oglala was given clear notice that unilateral action in permitting its attorney's contract to lapse and in adopting a resolution favoring land restoration over a money judgment did not constitute an effective withdrawal from litigation. *Oglala Sioux Tribe* v. *Homestake Min. Co.*, 722 F.2d 1407, 1413, n.6 (8th Cir. 1983). The tribe still did nothing in this case.

3. In 1985, Sioux counsel moved for leave temporarily to withdraw as the attorney for Oglala (Pet. App. 10a; Pet. App. 38a). The tribe again ignored the motion. The Claims Court again denied the motion without prejudice "because the case 'requires that competent, experienced and knowledgeable counsel remain as attorney of record, until there has been an appropriate . . . substitution of counsel' " (Pet. App. 10a; Pet. App. 38a). Oglala again ignored the court's order.[9]

4. At a status conference held on March 5, 1987, and attended by Sioux tribal representatives, including the Oglala president, the Claims Court encouraged counsel

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[9] As an excuse for Oglala's inaction, petitioners allege that the tribe was too poor to hire an attorney for the purpose of filing a notice of appearance and a follow-on motion for voluntary dismissal (Pet. 9, 15). Both lower courts knew this contention to be untrue. During the entire period in question, Oglala was conducting an active litigation program, including a petition for a writ of certiorari in this case, through paid counsel. *See, e.g.: Cheyenne River Sioux Tribe* v. *United States*, 806 F.2d 1046 (Fed. Cir. 1986), *cert. denied sub nom., Oglala Sioux Tribe* v. *United States*, —— U.S. ——, 107 S. Ct. 3184 (1987); *Oglala Sioux Tribe* v. *State of South Dakota*, 770 F.2d 730 (8th Cir. 1985), *cert. denied* 475 U.S. 1091 (1986); *Oglala Sioux Tribe* v. *Homestake Min. Co., supra*; *Oglala Sioux Tribe* v. *Hallett*, 708 F.2d 326 (8th Cir. 1983); *Oglala Sioux Tribe* v. *United States*, 650 F.2d 140 (8th Cir. 1981), *cert. denied* 455 U.S. 907 (1982).

to enter into a fact stipulation as to offsets in order to bring the case to a close, as previously suggested by the Federal Circuit in an appeal to which Oglala was a party. Pet. App. 24a-25a, 33a; *Cheyenne River Sioux Tribe* v. *United States, supra.* Oglala still did nothing in court before entry of final judgment on July 30, 1987. Finally, on September 28, 1987, petitioners filed their Rule 60(b) motion and two months later moved to change their attorney (Pet. App. 10a).

Based upon the foregoing record, the Claims Court ruled that petitioners' attempt to reverse direction in this case came "too late" (Pet. App. 38a). On appeal, the Federal Circuit concluded that, far from abusing its discretion,

> [t]he Claims Court was fully justified in refusing to terminate the authority of the attorneys who had been handling this complex litigation for 30 years and were at the point of successfully completing it, unless and until the appellant tribes moved to substitute new counsel * * *.

Pet. App. 11a. In so holding, the court below applied to petitioners exactly the same rules that govern the conduct of every other litigant, not a new rule sanctioning special treatment for Indian tribes.[10]

Throughout this litigation petitioners had an unquestioned right to change their counsel, but they failed to exercise it. The decision below holding petitioners accountable for that specific inactivity does not vest attorneys generally with control over Indian claims or frustrate any federal policy of tribal self-determination. That factually-based, non-discriminatory decision also presents no legal issue worthy of this Court's review.

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[10] As the Third Circuit recently made clear, if parties to a lawsuit fail to move for a change of attorneys in compliance with applicable court rules, existing counsel may be required to continue their representation even after discharge. *Ohntrup* v. *Firearms Center Incorporated,* 802 F.2d 676 (3rd Cir. 1986).

II. The decision below does not conflict with a decision of this Court or any other court of appeals.

Petitioners argue that the decision below conflicts with many opinions holding that attorneys may not settle cases without their clients' consent (Pet. 13-15). The short answer, as the Federal Circuit concluded, is that the fact stipulation as to offset amounts into which counsel entered in this case was not a settlement (Pet. App. 8a-10a). The rule is well-established that stipulating as to evidentiary matters is exactly the type of activity attorneys can undertake "as part of the normal conduct of litigation without the necessity for obtaining the approval of their clients." *Cheyenne River Sioux Tribe* v. *United States*, *supra*, 806 F.2d at 1053; *see Lipp* v. *National Screen Serv. Corp.*, 290 F.2d 321, 322 (3rd Cir. 1961); *Christy* v. *Atchison, T & S. F. Ry. Co.*, 233 Fed. 255, 257 (8th Cir. 1916) (A stipulation by counsel "as to the existence of relevant facts entered into without fraud, mistake, or collusion, but in good faith, to save expense, and to facilitate the trial of the case" is valid and binding, even though "it resulted in a judgment. . . .").

Petitioners also complain that the court below did not discuss their argument that federal statutes require attorneys for Indian tribes to have federally-approved contracts in effect at all times (Pet. 9, 11, 13). The Federal Circuit, however, did not need to reach that issue. Sioux counsel always had currently effective contracts with a number of the reservation tribes, as petitioners concede (Pet. 7), and, in a representative suit, one would have been sufficient (*see* p. 2, *supra*).

Finally, as previously noted (p. 4, *supra*), the court below held that, since this suit was filed for the Sioux Tribe of Indians by eight modern reservation tribes in a representative capacity, the elimination of petitioners from the case would not change the judgment in favor of the Sioux Tribe (Pet. App. 12a). That ruling dovetails with the conclusion of the Eighth Circuit in related litigation. *Oglala Sioux Tribe* v. *Homestake Min.*

Co., supra, 722 F.2d at 1414 ("Even if the Oglala Sioux had obtained an order dismissing them from the Commission proceedings . . . [the tribe] would be collaterally estopped by the final judgment . . . because the Oglala Sioux are in privity with the Sioux Nation.").

In short, rather than present a conflict, the decision below is wholly consistent with the decisions of other Circuits.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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